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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH VASQUEZ, JR., Defendant and Appellant.	B203810 (Los Angeles County Super. Ct. No. TA084293)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed.

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Vasquez, Jr. appeals from the judgment entered upon his convictions by jury of two counts of first degree murder (Pen. Code, § 187, subd. (a), counts 1 & 2)[1] and one count of premeditated attempted murder (§§ 664, 187, subd. (a), count 3). The jury found to be true the special circumstance allegation that appellant committed multiple murders (§ 190.2, subd. (a)(3)) and the firearm use allegations within the meaning of section 12022.53, subdivisions (b), (c) and (d). The trial court sentenced him to a prison term of life without parole plus 25 years to life on counts 1 and 2 and life plus 25 years to life on count 3, counts 2 and 3 being concurrent to count 1. Appellant contends that (1) there is insufficient evidence to support his convictions, and (2) the trial court erred in not including certain optional paragraphs of CALCRIM No. 604.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

The shooting

We review the evidence in accordance with the usual rules on appeal. (See *People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Autry* (1995) 37 Cal.App.4th 351, 358.) On March 18, 2006, at approximately 10:00 pm., Jose Garcia (Garcia) met his friends, Laro De La Rosa (De La Rosa) and Esteban Bueno (Bueno), at a birthday party at the Lynwood Park pool. After the party, Garcia waited outside for them. Appellant and two other men approached him. Appellant asked, "Are you from Compitas?" Garcia responded that he was not. De La Rosa and Bueno were nearby, Bueno involved in a verbal exchange with other men. He told them, "Fuck Lynwood" and "All you guys, little bitches."

Appellant walked to a nearby car and retrieved something. He returned to Garcia and asked, "What's up? You from Compitas?" Garcia replied, "No, man. I already told you no. I don't bang, but I live in Compton." Appellant said, "No, no," so Garcia

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

walked away. As he did, a much smaller man came towards him. Garcia pushed the man, who fell on his back. Appellant then aimed a handgun at Garcia and began shooting, firing twice and striking him both times in the right leg. Garcia ran, and appellant fired again, striking the back of his other leg. Garcia heard additional shots and collapsed.

Rene Chaidez (Chaidez), one of the many partygoers, saw a verbal confrontation outside and heard talk about Lynwood and Compton. He saw a man push someone to the ground. He saw no other physical engagement or weapons.[2] Chaidez heard gunshots and saw Garcia, Bueno and De La Rosa fall. After the shootings, Chaidez saw a "sharp little [house] key" on the ground. It was not near any of the victims nor did he see any of them holding it.

Alberto Soltero (Soltero) also saw and heard a verbal altercation. He saw appellant, whom he had known for years, grip a handgun with both hands and shoot, aiming at his three victims one by one.

Forensic evidence

Deputy Medical Examiner Juan Carrillo performed an autopsy on De La Rosa. He opined that De La Rosa died of multiple gunshot wounds. Two bullets went from his back to his front, one entering the back of his skull and a second bullet his lower back. Dr. Carrillo also opined, based upon the report of another medical examiner who performed an autopsy on Bueno, that Bueno also died of gunshot wounds, one entering the side of his chest near the back of his armpit and another entering the back of his right leg and fracturing his femur bone.

Apprehension of appellant

When appellant was apprehended a month after the shootings, he told detectives that he was in Bakersfield when they occurred.

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[2] Ivan Morales, another partygoer, also saw someone push someone else. He saw nothing else physical and no one with weapons other than appellant's gun.

Gang evidence

Los Angeles County Sheriff's Detective Gerhaldt Groenow testified as a gang expert that Lynwood Dueces and Compitas were rival Lynwood gangs. The questions, "Where are you from," or "Are you from Compitas?" are ways of asking a person's gang affiliation. These questions are unfriendly and often precede a violent attack.

Gangs commit crimes to frighten and intimidate people in the community. Gang "members" commit crimes for the benefit of the gang, while gang "affiliates" typically socialize with gang members, sometimes becoming members and sometimes being used by members to carry weapons because affiliates are unknown to police.

Detective Groenow had no prior contact with appellant and found no record that he was a gang member, but opined that he was either an affiliate of the Lynwood Deuces or was trying to become a member by asking if Garcia was from Compitas. Appellant had "Lynwood" tattooed on his arm and three dots, meaning "mi vida loca," or "my crazy life," signifying that he was prepared for anything. He also appeared in a photograph with Lynwood Deuces gang members.

The defense's evidence

Appellant testified on his own behalf. He attended the pool party and left with Jorje Cortez (Cortez) and Adrian Velasquez. Outside he encountered Garcia who was intoxicated, "mad dogging" him and acting aggressively. Garcia asked if appellant was from Lynwood, and appellant answered, "Yes, I stay in Lynwood." Thinking he and Garcia might have mutual friends, appellant asked, "Why, you live in Compton?" He denied using the word "Compitas."

A van pulled up and two men got out. One of them rolled up his sleeves. The men said, "'Fuck you guys from Lynwood. You guys are little bitches.'" Appellant saw a small, sharp shank or knife held by the man who had rolled up his sleeves. He felt threatened, believing he was going to be stabbed. When appellant saw Garcia knock down Angel Rocha (Rocha), appellant went after Garcia and his friends. He fired the gun, but claimed he was not aiming at anyone.

Sixteen-year-old Rocha, who grew up in Lynwood and knew appellant, attended the pool party. After the party, he, Josue Morales (Morales), Morales's brother, Hector, and two girls were talking. Two men walked rapidly towards Morales and Hector and said, "Fuck Lynwood. It's Compton. It's KTC, 155 Street." One of them rolled up his sleeves and made fists as if preparing to fight. According to Rocha, without provocation, the man who did not roll up his sleeves and who weighed approximately 200 pounds approached him from behind and pushed him to the ground. Rocha was only five feet five inches tall and weighed 135 pounds. As Rocha fell, he heard several gunshots but did not see the shooter. The men who were calling names had been shot. Rocha did not see any weapons in any of their hands.

Morales went to the party with Rocha and appellant. He had known appellant for several years and believed appellant was not a gang member. Morales saw appellant and a much larger man arguing. He saw a white truck from which two men exited and approached him and his friends. One of the men rolled up his sleeves and went to where the big man and appellant were arguing. He was saying, "Fuck Lynwood" and "You guys are a bunch of little bitches." This man had something shiny in his hands. The men approached appellant and then Morales. The man with the shiny object yelled, "Fuck Lynwood, Fuck Lynwood" and yelled, "Compton, Compton 155." Morales felt threatened when he saw the shiny object. He saw appellant take out a gun. After appellant fired the first shot, Morales ran back into the building.

Carlos Gastelum (Gastelum) and Cortez attended the party with appellant. Gastelum claimed he was not a gang member but that he and appellant were members of a "party crew" known as "Kings of Crunk" which promoted parties for fun and profit. When the pool party was over, Gastelum and Cortez left with appellant. They saw two men who looked like gangsters get out of a white truck. The men approached them and yelled gang insults. One of them was holding a shiny object that looked like a knife. Gastelum and Cortez saw Rocha pushed and fall and then heard gunshots.

DISCUSSION

I. Sufficiency of the evidence

Appellant contends that there is insufficient evidence to support his convictions. He argues that "[b]ased upon the evidence at the trial, [he] should have been convicted of manslaughter based upon a theory of imperfect self defense. There was no evidence from any witness which countered the Defendant's own testimony that he was in fear for his life. . . . The Defendant testified that he believed that he saw a shank or knife in the hand of one of the attackers and this caused him to pull out his gun and shoot rapidly and wildly. This type of action is not indicative of premeditated murder. . . ." This contention is patently meritless.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry, supra,* 37 Cal.App.4th at p. 358.) We must presume every fact in support of the judgment that the trier of fact could have reasonably deduced from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin, supra,* at p. 331.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

Appellant misconstrues the applicable standard for reviewing the sufficiency of evidence. He focuses on the evidence supporting his claim that the jury should have found him guilty only of voluntary manslaughter. Our task is to assess whether there is

substantial evidence to support the verdict the jury did reach, not the result appellant would like them to have reached. We find that there is ample evidence here.

Murder is the unlawful killing of a human being with malice aforethought and is first degree murder if committed with premeditation and deliberation. (§§187, 189.) Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.'" (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1217.) The intent to kill is rarely proven by direct evidence for "[o]ne who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) Rather, circumstantial evidence will usually determine this issue. Facts regarding the defendant's conduct showing prior planning, the defendant's relationship with the victim from which motive can be inferred, and the manner of killing from which the jury could infer that the defendant wanted to kill the victim all bear on whether the killing was premeditated and done after deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) Minimal time is required to establish premeditation and deliberation, (*People v. Hughes* (2002) 27 Cal.4th 287, 371), for "'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*Ibid*.)

There was substantial evidence here that appellant intended to kill his victims. There was evidence he was associated with the Lynwood Deuces gang. Garcia's friends made derogatory comments about Lynwood that the jury could reasonably have inferred disrespected that gang. After the party, appellant approached Garcia and asked if he was affiliated with the rival Compitas gang. The gang expert indicated that such a question is not a friendly one, but one seeking to ferret out rival gang members to violently attack or kill. These facts provided appellant with a gang motivation to kill his three victims. Additionally, appellant shot Garcia, De La Rosa and Bueno from close range, striking each with multiple gunshot wounds. Shooting someone at close range is a strong

indicator of intent to kill. (See, e.g., *People v. Thomas* (1992) 2 Cal.4th 489, 518; *People v. Lashley, supra,* 1 Cal.App.4th at p. 945 [shooting at point-blank range "undoubtedly creates a strong inference that the killing was intentional"].) The multiple bullets striking each of the three victims suggest that appellant's intent was not merely to protect himself from an attack. The fact that each of the victims was shot from behind belies appellant's claim that he shot to defend himself. One need not defend oneself from fleeing, unarmed people. Furthermore, several witnesses saw no weapons other than appellant's gun. Even if there was a shank, it was held by only one of the three victims and would not justify killing them all.

There was also substantial evidence that appellant's attack was deliberate and premeditated. After Garcia denied involvement with Compitas, appellant went to a car inferentially to retrieve the gun he then used for the shooting which he admitted committing. Planning can be inferred from evidence that the defendant obtained a weapon and used it on the victim. (See, e.g., *People v. Miller* (1990) 50 Cal.3d 954, 993 [defendant kept a length of pipe in his car and used it as a weapon]; see also *People v. Belmontes* (1988) 45 Cal.3d 744, 792; *People v. Haskett* (1982) 30 Cal.3d 841, 850; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192 [defendant obtained a gun to shoot someone and drove around looking for someone to shoot].) When he returned to Garcia, he again asked, "What's up? You from Compitas?" Garcia responded that he lived in Compton but did not "[gang] bang."

While appellant testified that he was frightened and simply emptied the gun shooting wildly, Garcia testified that appellant aimed the gun at him. Soltero testified that appellant aimed at the victims one by one. Moreover, despite his purported wild shooting, appellant only hit his three victims, though many people leaving the party were present in the area.

When arrested, appellant initially told police that he was with a friend in Bakersfield at the time of the shooting. A willfully false statement about a crime can be viewed as a consciousness of guilty. (See *People v. McGowan* (2008) 160 Cal.App.4th

1099, 1103-1104.) Given this lie, the jury could well have given appellant and his friends' testimony little or no weight.

II. Failure to instruct

Pursuant to appellant's request, the trial court instructed the jury on self-defense and defense of another (CALCRIM No. 505), over the prosecutor's objection that there was insufficient evidence, on voluntary manslaughter based on heat of passion and imperfect self-defense (CALCRIM Nos. 570 & 571), and on attempted voluntary manslaughter based on heat of passion and imperfect self-defense (CALCRIM Nos. 603 & 604).

CALCRIM No. 571[3] instructed on voluntary manslaughter as a lesser included offense of murder and CALCRIM No. 604[4] attempted voluntary manslaughter as a lesser

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[3] CALCRIM No. 571, as given, provides: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another. [¶] If you conclude the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense or imperfect defense of another if: [¶] 1. The defendant actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder."

[4] CALCRIM No. 604, as given, provides: "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill a person because he acted in imperfect self-defense or defense of another. [¶] If you conclude the defendant acted in complete self-defense or defense

included offense of attempted murder. The trial court did not give the following three optional paragraphs of these instructions: "[If you find that <*insert name of alleged victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.] [¶] [If you find that the defendant knew that <*insert name of alleged victim*>had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.] [¶] [If you find that the defendant received a threat from someone else that (he/she) reasonably associated with <*insert name of alleged victim*>, you may consider that threat in evaluating the defendant's beliefs.]" (CALCRIM No. 604.)

Appellant contends that the trial court erred in failing to include the omitted portions of CALCRIM Nos. 571 and 604 sua sponte. He argues that the failure to give them "was critical because the threat or past harm could have come not from an individual but from a gang, a group or someone else from the surrounding area who had accosted the Defendant in the past as he testified that on at least two prior occasions he had been attacked."

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of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense or defense of another and imperfect self-defense or defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense or defense of another if: [¶] 1. The defendant took at least one direct but ineffective step toward killing a person. [¶] 2. The defendant intended to kill when he acted. [¶] 3. The defendant believed that he or someone else was in imminent danger of being killed or suffering great bodily injury. AND [¶] 4. The defendant believed that the immediate use of deadly force was necessary to defend against the danger. BUT [¶] 5. The defendant's beliefs were unreasonable. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of violence to himself or someone else. [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder."

Respondent contends that appellant has forfeited this claim by failing to raise it in the trial court by requesting that the trial court instruct the jury regarding antecedent threats and that it is in any event meritless. We agree with respondent.

Forfeiture

Generally, "'[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Gonzalez* (2002) 99 Cal.App.4th 475, 483.) Appellant requested CALCRIM Nos. 571 and 604 and makes no claim that they are incorrect in law. He merely claims that they are incomplete in failing to include the omitted paragraphs. But having failed to request those paragraphs or object to their absence, appellant's contention has been forfeited. Even if preserved for appeal, we would nonetheless reject this contention on the merits.

Instructions

In criminal cases, """"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Even an accurate instruction need not be given if there is no evidence to which it properly relates. (See *People v. Ortiz* (1923) 63 Cal.App. 662, 667.)

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) A pinpoint instruction relates particular evidence to an element of the offense or defense. (*People v. Rogers* (2006) 39 Cal.4th 826, 878.) But the trial court has no obligation to give a pinpoint instruction when neither party has requested it. (*People v. Silva* (2001) 25 Cal.4th 345, 371.)

"It is undisputed that there is a line of authority holding that it is erroneous to refuse a request for instruction on the effect of the victim's antecedent threats or assaults

against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* 110 Cal.App.4th 484, 488.) "The trial court was obligated to instruct on the basic principles of self-defense. It satisfied this duty by giving the standard CALJIC instructions on this topic. These instructions are legally correct and the concept of antecedent assaults is fully consistent with the general principles that are expressed therein. [Citation.] The issue of the effect of antecedent assaults against defendant on the reasonableness of defendant's timing and degree of force highlights a particular aspect of this defense and relates it to a particular piece of evidence. An instruction on the topic of antecedent assaults is analogous to a clarifying instruction. It is axiomatic that '[a] defendant who believes that an instruction requires clarification must request it.' [Citation.] Therefore, we conclude that this is a specific point and is not a general principle of law; the trial court was not obligated to instruct on this issue absent request." (*Id.* at p. 489.)

We agree with *Garvin*. The omitted portions of CALCRIM Nos. 571 and 604 are pinpoint instructions on antecedent threats and assaults which simply pinpoint the types of things the jury can consider in determining the reasonableness of appellant's belief of the imminent danger of death or great bodily injury that would justify the use of deadly force in defense. Such pinpoint instructions must be requested to be given. The Bench Notes to CALCRIM No. 571 so indicate, stating: "If there is sufficient evidence, the court should give the bracketed paragraphs on prior threats or assaults *on request*." (Italics added.) Having failed to request these pinpoint portions of CALCRIM Nos. 571 and 604, the trial court did not err in failing to include them.

Further, there was no evidence here justifying including those paragraphs. There was no evidence any of the victims or anyone associated with them ever threatened appellant or anyone associated with him.

Even if the trial court erred in failing to include the omitted paragraphs, that error was harmless in that there is no reasonable probability that a more favorable verdict would have ensued had those paragraphs been given. (*People v. Ervin* (2000) 22 Cal.4th 48, 91; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The jury was properly instructed

on self-defense and imperfect self-defense. It was told to consider all circumstances as known and appeared to appellant in evaluating his beliefs. Jurors were free to consider appellant's testimony that he had been previously attacked by unidentified gang members, and his counsel was free to argue that point.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ